

MAY 3 1993

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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OUR FILE NO.

May 3, 1993

2046-002

HAND DELIVERED

Ms. Donna R. Searcy
Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

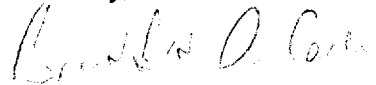
Re: MM Docket No. 93-51
FM Proceeding, New Albany, Indiana

Dear Ms. Searcy:

Enclosed is an original and six (6) copies of Opposition to Petition to Enlarge which we request that you accept for filing on behalf of our client, Midamerica Electronics Service, Inc., in the above-referenced proceeding.

Should the Commission have any questions, kindly direct them to the undersigned or Marjorie R. Esman of this office.

Sincerely,



Bradford D. Carey

BDC/bgc

Enclosures

cc: Peter Boyce, w/encl.

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MAY 23 1993

*Before the
Federal Communications Commission
Washington, D.C. 20554*

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In re Applications of)	MM DOCKET NO. 93-51
)	
MARTHA J. HUBER)	File No. BPH-911114ME
)	
ADAMS RIB, INC.)	File No. BPH-911115MA
)	
RITA REYNA BRENT)	File No. BPH-911115MC
)	
D.E.K.W. COMMUNICATIONS, INC.)	File No. BPH-911115MF
)	
MIDAMERICA ELECTRONICS)	File No. BPH-911115ML

I. THE PETITION IS PROCEDURALLY DEFICIENT

Section 1.229(d) governs the form and content required for Motions to Enlarge Issues. That provision provides that allegations of fact "shall be supported by affidavits of a person or persons having personal knowledge thereof." Huber's Petition contains no affidavits at all, and therefore does not meet the standard required by the rules.

Huber contends that the allegations are based on the applications of the applicants in this proceeding, which may be officially noticed. Huber therefore contends that affidavits are not necessary, under the terms of Section 1.229(d). However, Huber is not relying merely on a comparison of the content of the applications, but on a conclusion drawn from the application of Midamerica, a conclusion which is not derived from the face of any of the applications. Huber's conclusory allegation that Midamerica's cost estimate is unreasonable, *if it were true*, must be supported by affidavits, which are totally lacking.

Under similar circumstances, the Commission has refused to add issues where affidavits concerning the alleged inadequacies of cost estimates are not submitted. Indeed, in two of the cases cited by Huber, the issues requested were denied precisely because of the lack of affidavits. California Stereo, Inc., 39 FCC 2d 401 (Rev. Bd. 1973); Viking Television, Inc., 17 FCC 2d 823 (Rev. Bd. 1969).

Under the circumstances, because Huber has not provided affidavits to support her conclusory allegations concerning Midamerica's cost estimates, because the Petition is not in compliance with Section 1.229(d), and because the Review

Board has at least twice refused to add issues similar to those sought by Huber where affidavits were not provided, Huber's Petition must be dismissed.

II. MIDAMERICA'S COST ESTIMATES ARE REASONABLE

Midamerica is quite capable of building its proposed station and operating it within the proposed budget. Midamerica is an existing entity, with offices in the New Albany Industrial Park, within the city limits of New Albany, Indiana, the community of license of the proposed station. The new station can readily be operated from the existing offices, utilizing existing space and furnishings. Even management system computers are in place.

Midamerica is in the business of constructing and maintaining broadcast

on the air. Midamerica's cost estimates were based upon the reasoned determination and analysis of its president, Peter Boyce. Having been in the broadcast engineering business for in excess of twenty years, Mr. Boyce is well aware of the equipment necessary to construct the facility of this sort which he has proposed. He is also aware of the availability of equipment and the cost at which he can purchase it. Huber has submitted nothing to suggest that Boyce and Midamerica, broadcast engineering consultants for many years, would be unable to construct the station Midamerica has proposed and initially operate it for the amount estimated.

IV. THE MASS MEDIA BUREAU DID NOT ADD AN ISSUE
WITH THE SAME INFORMATION BEFORE IT

While it is true, as Huber suggests, that the staff may designate an issue if it determines that an applicant's cost estimates are unreasonable, in this instance the staff, after fully considering the cost estimates contained in the applications declined to add such an issue. In Columbus Broadcasting Corporation, 3 FCC Rcd. 5480 (Audio Services Division 1988), the staff reviewed the cost estimates and financial projections of all of the applicants pursuant to previous procedures which entitled the Audio Services Division to request this information from all applicants. (This information is now routinely filed by applicants, and was submitted to the staff by all applicants to this proceeding). In Columbus, the staff determined that two of the applicants had unreasonable cost estimates, and the staff designated an issue accordingly. Here, in contrast, the staff after reviewing cost estimates declined to designate an issue against any applicant concerning cost estimates. The Audio Services Division has therefore determined, from its review, that Midamerica's cost

estimates are not unreasonable. As Huber has submitted no new evidence, and as the Audio Services Division did not add an issue with the same information before it, the Presiding Judge may not now designate an issue that was not added by the Audio Services Division.

The party seeking the addition of special issues must make a prima facie showing that a substantial and material issue exists. The Commission **requires** that allegations be supported by affidavits from persons with factual knowledge. Huber has only speculated that Midamerica's cost estimates are low. She did not provide an affidavit from anyone. Nor is this a matter of which Official Notice may be taken of the required elements. Huber is required to have provided affidavits of persons with knowledge that the estimates were unreasonable.

The Mass Media Bureau declined to add an issue. The Bureau had before it the same information on which Huber's motion is based, and it did not add an issue. Now, with the additional information (regarding equipment already on hand, etc.), it is respectfully submitted that the requested issued should be DENIED.

Respectfully submitted,



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Telephone: (504) 830-4646
Counsel for Midamerica Electronics
Service, Inc.

Dated: May 3, 1993

DECLARATION OF PETER BOYCE

I, Peter C. L. Boyce, do hereby declare, under the pains and penalties of perjury under the laws of the United States of America that:

I have been President of Midamerica Electronics Service, Inc. since its inception. I own all of the stock in Midamerica and devote my energies full time to its business affairs. Although Midamerica does have employees other than myself, I am familiar with all of the business affairs of the company.

The principal business of Midamerica is the installation and maintenance of equipment at broadcast stations. To serve its clients better than would otherwise be possible, Midamerica has established dealer relationships with certain select equipment manufacturers, including Nautel (a manufacturer of solid state transmitters) and Motorola. In certain transactions, Midamerica has accepted used equipment on a trade-in basis.

Prior to forming Midamerica, I was employed as an engineer and chief engineer at various broadcast stations in the New Albany/Louisville area and served as a consultant to others.

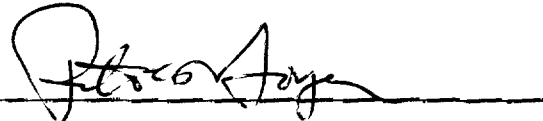
I personally prepared Midamerica's Application for a Construction Permit to build a new FM station at New Albany, Indiana. Prior to completing the application, I determined what equipment Midamerica would need to build the station, what it already had on hand and the cost of obtaining the rest. (For example, Midamerica already has a used transmitter and tower, ready for installation). Since Midamerica

~~and I are in the business of building broadcast facilities and installing them and~~

since Midamerica is a dealer for certain manufacturers, estimating the cost of construction of the station was not the major task that it would be for someone who had never built a station. Then, considering the programming I had in mind, I estimated the cost of running the station for three months without revenue.

At the time I signed Midamerica's application, the statements contained therein were, to the best of my knowledge and belief true. I hereby reaffirm that before signing the application I had engaged in a good faith estimation of the costs of construction and initial operation for three months without revenue of the proposed station. The number I placed on the application represents the cash that I estimated would be required to acquire what equipment and materials are needed for construction that are not on hand and to operate the station for three months.

Signed: _____

A handwritten signature in black ink, appearing to read "Robert A. Jones", written over a horizontal line.

this 29th day, April 1993.

CERTIFICATE OF SERVICE

I, Brenda Cherry, a secretary in the law firm of Hardy and Carey, do hereby certify that a copy of the above and foregoing document has been served on counsel for all parties to this proceeding, by mailing a copy of same via U.S. Mail, postage prepaid, this 3rd day of May, 1993, addressed to the following:

Honorable Richard L. Sippel *
Judge
Federal Communications Commission
2000 L Street, N.W., Room 214
Washington, D.C. 20554

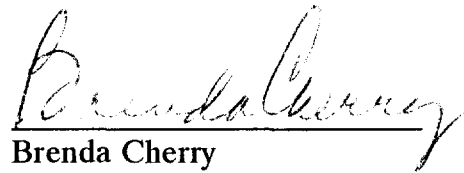
James Shook, Esq.
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Washington, D.C. 20554

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Brenda Cherry

* By Hand